IN THE
SUPREME COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS,
Plaintiff-Appellant,

v.

ALLAN A. TAITANO,
Defendant-Appellee.

Supreme Court No. 2014-SCC-0021-CRM

Superior Court Crim. No. 13-0111

OPINION

Cite as: 2017 MP 19

Decided December 28, 2017

Betsy Weintraub, Assistant Attorney General, Office of the Attorney General, Saipan, MP, for Plaintiff-Appellant.

Cindy Nesbit, Assistant Public Defender, Office of the Public Defender, Saipan, MP, for Defendant-Appellee.

BEFORE: JOHN A. MANGLONA, Associate Justice; ARTHUR R. BARCINAS, Justice Pro Tem.; TIMOTHY H. BELLAS, Justice Pro Tem.

MANGLONA, J.:

¶ 1 This appeal arises from a series of events which resulted in excluding a key witness from testifying at trial. Defendant-Appellee Allan A. Taitano ("Taitano") filed two motions to exclude the testimony of the alleged victim, Nukey Manglona ("Manglona"), based on prosecutorial misconduct. The trial court ("Initial Judge") denied both motions. The case was then transferred to another judge ("Transferee Judge"). Taitano moved to reconsider the Initial Judge's earlier orders denying his motion to exclude. The Transferee Judge granted Taitano's motion to reconsider and excluded Manglona from testifying at trial.

¶ 2 The Commonwealth of the Northern Mariana Islands ("Commonwealth") appeals the Transferee Judge's order granting Taitano's motion to reconsider and excluding the testimony. It argues: (1) the "law of the case" doctrine precluded the Transferee Judge from reconsidering another judge's ruling; (2) the Transferee Judge erred when it granted Taitano's motion to reconsider; and (3) the Transferee Judge abused its discretion when it excluded Manglona from testifying at trial. In response, Taitano moves to dismiss the appeal arguing lack of jurisdiction or, in the alternative, that the Transferee Judge correctly reconsidered the Initial Judge's order and excluded Manglona from testifying. For the reasons stated below, we VACATE the Transferee Judge's order excluding testimony and REMAND the case for proceedings consistent with this opinion.

I. FACTS AND PROCEDURAL HISTORY

¶ 3 In 2013, Taitano allegedly attempted to sexually assault Manglona.[1] Taitano was arrested and charged with four criminal offenses, including Attempted Sexual Assault in the Second Degree in violation of 6 CMC § 301(a)[2] and § 1302(a)(1).[3]

¶ 4 Prosecutor Margo Badawy ("Badawy") met Manglona on Rota and advised:

> You're an adult. You make the choice to speak to whomever you want. If you don't want to speak with [the defense], don't speak with them, if you do want to speak with them, speak with them.

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[1] Manglona is a resident of Rota. The alleged incident, however, occurred on Saipan.

[2] "A person commits the offense of attempt if, with intent to commit an offense, he does an overt act which constitutes a substantial step in a course of conduct planned to culminate in the commission of that offense." 6 CMC § 301(a).

[3] "An offender commits the crime of sexual assault in the second degree if (1) the offender engages in sexual contact with another person without consent of that person." 6 CMC § 1302(a)(1).

> However, that person will be working on [the] Defendant's case, and it is not in your best interest to speak with them, if you don't want to speak with them, because they represent the Defendant.

Badawy Aff. 1.

¶ 5 Later, when defense investigator Ulysses Kapileo ("Kapileo") and defense counsel Eden Schwartz ("Schwartz") attempted to initiate an interview with Manglona, he declined, stating he was advised not to speak with the defense, that speaking with the defense was not good for his case, and that he should not disclose the name of the person who advised him.

¶ 6 Based on this event, Taitano moved to exclude Manglona from testifying at trial as a sanction for prosecutorial misconduct or, in the alternative, to order Manglona to appear at a deposition. The Initial Judge denied Taitano's motion to exclude, finding on the basis of Badawy's affidavit that: "(1) [Badawy] did not interfere with [Manglona's] free choice to speak (or refuse to speak) with the defense; and (2) the advice given to [Manglona] was tantamount to informing the victim that the ultimate decision whether to decline interview with defense counsel remained with him." *Commonwealth v. Allan A. Taitano*, Crim. No. 13-0111 (NMI. Super. Ct. Sept. 12, 2014) (Order Den. Def.'s Mot. to Exclude Test. at 5).

¶ 7 The Initial Judge, however, granted the alternative relief, ordering Manglona to appear at a deposition "to address the potential prejudice that may have resulted in proceeding to trial without defense counsel's access to the victim's testimony." *Id.* at 6. Following a hearing, the Initial Judge amended their decision and instead ordered Manglona to appear on Saipan before October 3, 2014, "at which time he shall decide whether or not he chooses to be interviewed by [d]efense counsel." *Commonwealth v. Allan A. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Sep. 23, 2014) (Minute Order at 1).

¶ 8 On October 2, 2014, Manglona arrived on Saipan. In the course of deciding where the interview should take place, Badawy and Chief Public Defender Douglas Hartig ("Hartig") engaged in a heated argument at the Office of the Attorney General. There, Badawy addressed Hartig as a "little bitch," and Hartig asked Badawy when she would let Manglona "out of his cage." ("LB Incident"). These conversations took place within earshot of Manglona. After the LB Incident, Manglona declined to speak with both Hartig and Badawy. When Hartig asked why he did not want to talk about the case, Manglona responded that it was not good for his case.

¶ 9 In light of the LB Incident, Taitano filed a second motion to exclude Manglona's testimony and requested an evidentiary hearing. The Initial Judge, without an evidentiary hearing, denied the motion, stating, "both parties may have let their emotions run in light of the circumstances at hand, but [this court] refuses to find that any prejudice resulted from such an encounter." *Commonwealth v. Allan A. Taitano*, Crim. No. 13-0111 (NMI. Super. Ct. Oct. 9, 2014) (Order Den. Def.'s Mot. to Exclude Test. of Cathy Manglona, Nukey

Manglona, and Moses Charfauros at 5). The Initial Judge concluded "no new evidence provided by [Taitano] indicates that this [c]ourt's decision regarding the exclusion of [Manglona's] testimony should change . . . . " *Id.* at 6.

¶ 10 The case was then reassigned to the Transferee Judge. There, Taitano moved to reconsider the denial of his second motion. The Transferee Judge granted the motion for reconsideration and scheduled an evidentiary hearing at the Guma' Hustisia on Saipan. At the hearing, Keola Fitial ("Fitial"), victim advocate and employee of the Office of the Attorney General, and Kapileo testified. Manglona was not ordered to appear but was present at the Centron Hustisia on Rota to participate in the hearing via Skype. However, without explanation, he left the courthouse before testifying.

¶ 11 The Transferee Judge granted Taitano's second motion to exclude Manglona's testimony. The Commonwealth appeals the Transferee Judge's order granting reconsideration and excluding the testimony under 6 CMC § 8101(b).[4] This case has been stayed pending resolution of the appeal.

II. JURISDICTION

¶ 12 We have jurisdiction over final judgments and orders of the Commonwealth Superior Court. NMI CONST. art. IV, § 3.

¶ 13 Taitano raises a threshold issue. He argues the order excluding testimony cannot be appealed because it is not a final order. Jurisdictional issues are questions of law and are reviewed de novo. *Commonwealth v. Borja*, 2015 MP 8 ¶ 12.

¶ 14 Taitano asserts two challenges to our jurisdiction. First, he claims we may only review final orders and judgments of the Superior Court. He argues we lack authority to review orders excluding evidence because they are interlocutory in nature. Second, Taitano claims the statute authorizing the government to appeal interlocutory orders conflicts with Article IV, Section 3 of the NMI Constitution.

¶ 15 We recently addressed a similar question. In *Commonwealth v. Arurang*, we considered whether a suppression order was interlocutory, and if so, whether Section 8101(b) conflicted with the finality requirement imposed by Article IV, Section 3 of the NMI Constitution. 2017 MP 1 ¶ 10. We stated that, while "suppression orders are generally interlocutory in nature," they are final for the purpose of appeal if "[they] terminate[] the case, or when [they] handicap[] the prosecution because it is not able to present all of its evidence." *Id*. ¶ 11. There, the government was unable to present the sum of its evidence at trial because of the suppression order. Furthermore, later review of the order was not possible.

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[4] In pertinent part, 6 CMC § 8101(b) states, "[a]n appeal by the Commonwealth government shall lie to the Supreme Court from a decision or order of the Superior Court suppressing or excluding evidence . . . if the Attorney General certifies to the Superior Court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of fact material in the proceeding."

Because of these considerations, we held the suppression order in *Arurang* was appealable, and Section 8101(b) did not conflict with our Constitution. *Id.*

¶ 16 Here, the Transferee Judge precluded Manglona, the alleged victim and sole eyewitness, from testifying at trial. Without his testimony, the Commonwealth would be handicapped in presenting facts material to its case. The exclusion, we determine, would have the effect of terminating the proceedings. While orders excluding evidence, such as suppression orders, are generally interlocutory in nature, they are considered final for the purpose of appeal if they have the effect of terminating or substantially handicapping the prosecution. Thus, following *Arurang*, we conclude the order in question is appealable as a final order, and Section 8101(b), which allows the appeal of such order, does not conflict with our Constitution. Accordingly, we have jurisdiction.

III. STANDARDS OF REVIEW

¶ 17 Parties raise multiple issues on appeal. Because we find their framing of the issues redundant and needlessly complex, we reframe them. First, we consider whether the "law of the case" doctrine precluded the Transferee Judge from reconsidering the Initial Judge's order. "The law of the case is a question of law that is reviewed de novo." *Cushnie v. Arriola*, 2000 MP 7 ¶ 3. Second, we examine whether the Transferee Judge erred in granting Taitano's motion to reconsider the Initial Judge's order. We review a lower court's ruling of a motion to reconsider under the abuse of discretion standard. *Angello v. Louis Vuitton Saipan, Inc.*, 2000 MP 17 ¶ 24 (citation omitted). Third, we consider whether the Transferee Judge erred in granting Taitano's motion to exclude Manglona's testimony. We review a court's decision to exclude evidence based on a claim of prosecutorial misconduct for abuse of discretion. *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987).

IV. DISCUSSION

A. Law of the Case Doctrine

¶ 18 The Commonwealth argues the Transferee Judge erred when it considered Taitano's second motion to exclude Manglona's testimony. It asserts that under the law of the case doctrine, the Transferee Judge did not have the authority to reconsider the Initial Judge's order. We review this issue de novo. *Cushnie*, 2000 MP 7 ¶ 3.

¶ 19 Under the law of the case doctrine, "courts are generally required to follow legal decisions of the same or a higher court in the same case." *Wabol v. Villacrusis*, 4 NMI 314, 318 (1995) (citation omitted). The guiding principle behind the doctrine is one of finality. *Id*. It is designed "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit[,]" *Cushnie*, 2000 MP 7 ¶ 14 (citation omitted), and to protect the court and the parties from "repeated reargument by indefatigable diehards." *Camacho v. J. C. Tenorio Enter.*, 2 NMI 407, 414 (1992) (citation omitted). This doctrine, however, is "not an inflexible rule." *Cushnie*, 2000 MP 7 ¶ 15; *see also Arizona v. California*, 460 U.S. 605, 618 (1983) ("[L]aw of the case is an amorphous concept. . . . Law of the case directs a court's discretion, it does not

limit the tribunal's power.") (citations omitted); *Pepper v. United States*, 562 U.S. 476, 506–07 (2011) ("[T]he [law of the case] doctrine does not apply if the court is convinced that [its prior decision] is clearly erroneous and would work a manifest injustice.") (third alteration in original) (citation and internal quotation marks omitted). A court may reconsider an earlier ruling when the case presents unusual circumstances such as an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Camacho*, 2 NMI at 413 (citation omitted); *see also Cushnie*, 2000 MP 7 ¶ 12 ("While the doctrine does not jurisdictionally bar a court from reconsidering issues previously concluded, as does the related doctrine of res judicata, the principle of law of the case directs a court not to alter a previous judicial determination unless unusual circumstances are present.") (quoting *United States v. Eilberg*, 553 F. Supp. 1, 3 (D.D.C. 1981)). This test equally applies where a case is transferred from one judge to another. *Cushnie*, 2000 MP 7 ¶ 15 ("Even if a different judge is assigned to a continuing case, it is not inappropriate for that judge to arrive at a different decision. The judge still retains the ultimate discretion in the case.").

¶ 20 The Transferee Judge in this case reconsidered the Initial Judge's order, finding that it was clear error to rule the events surrounding Manglona's interview did not prejudice Taitano without holding an evidentiary hearing. Thus, we examine whether the Initial Judge clearly erred by not having an evidentiary hearing, giving the Transferee Judge grounds to reconsider the Initial Judge's order under the law of the case doctrine. We will find clear error "if after reviewing all the evidence we are left with a firm and definite conviction that a mistake has been made." *Commonwealth v. Crisostomo*, 2014 MP 18 ¶ 8 (citation omitted).

¶ 21 "Whether to hold an evidentiary hearing is a matter within the court's discretion. A [court] is not required to conduct an evidentiary hearing on a claim of prosecutorial misconduct unless a substantial right of the defendant has been put in jeopardy." *United States v. Polland*, 994 F.2d 1262, 1266 (7th Cir. 1993) (citations omitted). To merit a hearing, however, the defendant must allege specific facts which, "if proven, would warrant relief . . . ." *Commonwealth v. Bashar*, 2015 MP 4 ¶ 11 (citation omitted); *see also Ortiz v. Stewart*, 149 F.3d 923, 934 (9th Cir. 1998) ("To earn the right to a hearing, therefore, [a]ppellant [is] required to allege specific facts which, if true, would entitle him to relief.") (second alteration in original) (citation omitted).

¶ 22 Thus, in determining whether Taitano's claim necessitated an evidentiary hearing, we first examine whether any of Taitano's substantial rights were put in jeopardy, and if so, whether he alleged specific facts which, if proven true, would entitle him to relief.

¶ 23 Taitano asserts he has a constitutional right to interview witnesses before trial and this right was jeopardized when the prosecution interfered with Manglona's decision to speak with the defense.

1. Constitutional Right to Interview Witnesses Before Trial

¶ 24 "The Fifth Amendment Due Process Clause 'guarantees that a criminal defendant will be treated with the fundamental fairness essential to the very concept of justice.'" *United States v. Juan*, 704 F.3d 1137, 1140 (9th Cir. 2013) (quoting United States v. Valenzuela-*Bernal*, 458 U.S. 858, 872) (1982).[5] Within that right, a defendant has "constitutionally guaranteed access to evidence." *California v. Trombetta*, 467 U.S. 479, 485 (1984) (citation omitted). This includes a "right to interview witnesses before trial." *United States v. Black*, 767 F.2d 1334, 1337 (9th Cir. 1985). "Witnesses, particularly eye witnesses, to a crime are the property of neither the prosecution nor the defense. Both sides have an equal right, and should have an equal opportunity, to interview them." *Gregory v. United States*, 369 F.2d 185, 188 (D.C. Cir. 1966). "[P]rosecutors and other officials [must] maintain a posture of strict neutrality when advising witnesses of their duties and rights. Their role as public servants and protectors of the integrity of the judicial process permits nothing less." *United States v. Rich*, 580 F.2d 929, 934 (9th Cir. 1978). A witness may decline an interview, but that decision must be voluntary and not be based upon advice or discouragement from the prosecution. *Black*, 767 F.2d at 1338. The prosecution may inform witnesses of their rights, but may not hinder a witness's free choice to speak with the defense. *Id.*; *see also Gregory*, 369 F.2d at 189 (finding violation of defendant's right to a fair trial when prosecutor advised the witnesses not to talk to anyone unless he was present). Absent compelling justification, prosecution hindering a witness's free choice to speak with the defense violates a defendant's right of access to the witness. *Kines v. Butterworth*, 669 F.2d 6, 9 (1st Cir. 1981) ("However, when the free choice of a potential witness to talk to defense counsel is constrained by the prosecution without justification, this constitutes improper interference with a defendant's right of access to the witness."); *see also Fenenbock v. Dir. of Corr. for Cal.*, 681 F.3d 968, 974 (9th Cir. 2012) ("[T]he prosecution may not interfere with a witness's decision to grant or refuse pretrial access."). Thus, if Taitano's claim that the prosecution restricted Manglona's decision to speak with the defense is found to be true, we determine that his substantial right to interview a witness may have been put in jeopardy.

¶ 25 The question for us to determine, then, is whether Taitano alleged facts which, if proven true, would support his claim.

2. Facts Alleged Which, if Proven True, Would Entitle Relief

¶ 26 To merit an evidentiary hearing, the defendant must allege "specific and detailed" facts which, if proven true, would warrant relief. *Commonwealth v. Bashar*, 2016 MP 2 ¶ 10 (citation omitted). "At this stage, [defendant] does not

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[5] The Fifth Amendment Due Process Clause to the United States Constitution is applicable to the Commonwealth via the Covenant. Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, 48 U.S.C. § 1801 note, § 501(a); *Commonwealth v. Mettao*, 2008 MP 7 ¶ 16 n.2.

need to prove that the prosecutor committed misconduct or that his due process rights were violated; he only needs to allege a *colorable* claim for relief. This is a low bar . . . ." *Earp v. Strokes*, 423 F.3d 1024, 1035–36 (9th Cir. 2005) (emphasis in original). In particular, if factual allegations are outside the record, a defendant's claim signals the need for an evidentiary hearing. *Frazer v. United States*, 18 F.3d 778, 784 (9th Cir. 1994). This is also true when there are factual disputes which may only be resolved by weighing and scrutinizing the credibility of parties or witnesses. *E.g.*, *Bashar*, 2016 MP 2 ¶ 14; *Packer v. Superior Court*, 339 P.3d 329, 341 (Cal. 2014) ("[T]he credibility of petitioner's evidence cannot be determined without an evidentiary hearing to examine the disputed facts, which if resolved in petitioner's favor, would entitle him to relief . . . ."); *see also Earp*, 423 F.3d at 1034 ("In rare instances, credibility may be determined without an evidentiary hearing where it is possible to conclusively decide the credibility question based on documentary testimony and evidence in the record.") (citation and internal quotation marks omitted). "Conclusory claims are [however] insufficient to require an evidentiary hearing." *Bashar*, 2015 MP 4 ¶ 11 (citing *United States v. Fournier*, 594 F.2d 276, 279 (1st Cir. 1979)).

¶ 27 Whether evidentiary hearing is required in a prosecutorial misconduct claim is an issue of first impression in the Commonwealth. Because there is no factually analogous case law in this jurisdiction, we look to other jurisdictions for guidance. *Commonwealth v. Calvo*, 2014 MP 7 ¶ 25. In particular, we find the Ninth Circuit case of *Earp v. Stokes*, 423 F.3d at 1024, persuasive.

¶ 28 In *Earp v. Stokes*, the defendant was convicted and sentenced to death for raping and murdering a child. During trial, the defendant accused another person of committing the crime. After he was convicted, the defendant brought a habeas petition in the district court arguing his due process rights were violated because the prosecution interfered with his post-trial witness's decision to testify in support of his motion for a new trial. The defendant alleged that, after the witness spoke with the defense implicating another person as a suspect in the case, the prosecutor and a sheriff's deputy visited the witness in jail, "verbally abused him, and told him that he would never get out if he stood by his statement." *Id.* at 1033. Based on the threat, the witness recanted his statement. The defendant's allegations were supported by signed declarations from the witness, the defense investigator, and the defendant's attorney. The district court denied the defendant's petition without an evidentiary hearing, concluding the witness's declaration was "inherently untrustworthy and not worthy of belief." *Id.* at 1034.

¶ 29 On review, the Ninth Circuit found the defendant had alleged facts which, if proven true, would entitle him to relief. And it was error for the district court to resolve the defendant's claim on the basis of the witness's credibility "without taking the opportunity to listen to [the witness], test his story, and gauge his demeanor." *Id*. The court noted that "[i]n rare instances, credibility may be determined without an evidentiary hearing where it is possible to 'conclusively' decide the credibility question based on 'documentary testimony and evidence in the record.'" *Id.* (quoting *Watts v. United States*, 841 F.2d 275, 277 (9th Cir.

1998)). It concluded, however, that because the defendant's claim of prosecutorial misconduct was supported by documentary testimony and material facts were in dispute, the district court could not have made a credibility determination based on the record alone. *Id*. at 1034–35. Thus, the court concluded the defendant was entitled to an evidentiary hearing.

¶ 30 Here, material facts regarding Taitano's claim were in dispute and were outside the record. Taitano alleged that Badawy advised Manglona that speaking with the defense would not be in his best interest; that Manglona was not to speak with the defense; and that he was not to give the name of the person who gave him such advice. Badawy, on the other hand, denied making such statements to Manglona, except for advising him that speaking with the defense would not be in his best interest. Between these two conflicting testimonies, the Initial Judge resolved Taitano's claim on the basis of Badawy's credibility, concluding that they found her credible. This determination was made without weighing and scrutinizing the credibility of the witnesses' stories, although Taitano's claim was substantiated by the declaration of defense investigator Kapileo and by defense counsel Schwartz.

¶ 31 Although there are rare instances where credibility may be determined without an evidentiary hearing,[6] the facts here do not support such a conclusion. Rather, the evidence in the record was insufficient to determine witness credibility. As in *Earp*, we conclude that such a determination could not have been made in this case because Taitano's claim was supported by documentary testimony, and significant factual disputes existed regarding what advice was given to Manglona by the prosecution.

¶ 32 Additionally, Taitano presented detailed facts of the LB Incident demonstrating that the words and conduct of Badawy discouraged Manglona from speaking with the defense. Because these factual allegations were outside the record, there was a need to hold an evidentiary hearing to determine what impact, if any, the LB Incident had on Manglona. *See Davis v. Lehane*, 89 F.Supp. 2d 142, 151 (D. Mass. 2000) ("An evidentiary hearing affords . . . an opportunity to decide exactly what was said and what impact it had on [witness's] decision to meet with [the defendant's] trial counsel.")

¶ 33 Under the unique circumstances of this case, we are left with a definite and firm conviction that the Initial Judge clearly erred in finding, without an evidentiary hearing, that the prosecution did not interfere with Manglona's free choice to speak with the defense nor that the conduct did not prejudice Taitano.

¶ 34 Because the Initial Judge clearly erred, we conclude the law of the case doctrine did not preclude the Transferee Judge from reviewing the Initial Judge's

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[6] *See Bashar*, 2016 MP 2 ¶ 11 (concluding evidentiary hearing is not required in the context of ineffective assistance of counsel claim when defendant's claim is vague and conclusory).

order. Accordingly, we examine whether the Transferee Judge abused his discretion in granting Taitano's motion to reconsider the Initial Judge's order.

B. Motion to Reconsider

¶ 35 A court's decision whether to hear a motion to reconsider is reviewed under the abuse of discretion standard. *Angello,* 2000 MP 17 ¶ 24 (citation omitted). "Under this standard, the lower court's decision need only be reasonable to be upheld." *Id.* "An abuse of discretion exists if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Commonwealth v. Campbell*, 4 NMI 11, 16 (1993) (citation omitted). Similar to the law of the case doctrine, a motion to reconsider is allowed if there is an "intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Commonwealth v. Guerrero*, 2014 MP 2 ¶ 2 (citation omitted).

¶ 36 The Transferee Judge reconsidered the Initial Judge's order, finding it was clear error to rule that the events surrounding Manglona's interview did not prejudice Taitano without holding an evidentiary hearing. As discussed in paragraphs 21–34 of this opinion, we concur with the Transferee Judge that the Initial Judge clearly erred. We thus conclude the Transferee Judge's decision was reasonable, and, therefore, there was no abuse of discretion in granting the motion to reconsider.

C. Motion to Exclude Testimony of Manglona

¶ 37 The Commonwealth argues the Transferee Judge erred when it granted Taitano's motion to exclude the testimony based on due process grounds. This presents a mixed question of law and fact. First, it asserts the Transferee Judge applied the incorrect legal standards in determining whether the prosecution violated Taitano's constitutional right. "Whether the [court] applied the correct legal standard" is subject to de novo review. *Commonwealth v. Lot No. 353 New G*, 2015 MP 6 ¶ 14. Similarly, whether the prosecutorial misconduct violated a defendant's constitutional rights is reviewed de novo. *Commonwealth v. Jing Xin Xiao*, 2013 MP 12 ¶ 16 (reviewing constitutional claims de novo). Second, it argues the Transferee Judge erred in finding prosecutorial misconduct. In evaluating issues of prosecutorial misconduct, we review the court's findings of fact under the clearly erroneous standard. *United States v. Vavages*, 151 F.3d 1185, 1188 (9th Cir. 2013); *see Rebuenog v. Aldan*, 2010 MP 1 ¶ 15 ("[T]he [court's] findings of fact are reviewed under the clearly erroneous standard."). Third, it asserts that excluding the sole eyewitness and alleged victim was an improper remedy absent a finding of tangible prejudice. We review a court's decision to exclude evidence based on a claim of prosecutorial misconduct for abuse of discretion. *Meyer*, 810 F.2d at 1245; *see also Commonwealth v. Adlaon*, 4 NMI 171, 174 (1994) (reviewing the court's choice of sanction under abuse of discretion standard). An abuse of discretion exists "if the court based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the

evidence." *Campbell*, 4 NMI at 16. We begin by considering whether the Transferee Judge applied the correct legal standard.

1. Correct Legal Standard

¶ 38 The Commonwealth argues the Transferee Judge applied the wrong legal standards in determining whether the prosecution's words and actions constituted substantial interference with a defendant's constitutionally guaranteed right of access to witnesses. In particular, it argues the Transferee Judge improperly created a bright-line rule and relied on the American Bar Association Criminal Justice Standards ("ABA Criminal Standards").

¶ 39 Our case law has not addressed which legal standard applies in determining prosecutorial interference. When there is no binding Commonwealth authority, our courts are permitted to look to other jurisdictions for guidance. *Calvo*, 2014 MP 7 ¶ 25. Particularly, in resolving issues pertinent to the NMI Constitution, we find federal case law instructive. *See Commonwealth v. Hocog*, 2015 MP 19 ¶ 14 (noting that NMI Constitution is patterned after the federal Constitution, and therefore federal case law is instructive in interpreting NMI Constitution).

¶ 40 In paragraph 24 of this opinion, we outlined the appropriate guiding principles and legal standards in determining prosecutorial interference. We need not reiterate the standards again. But in summary, we stated the prosecution may inform witnesses of their rights, but may not hinder a witness's free choice to speak with the defense. This standard was gleaned from federal case law.

¶ 41 The Transferee Judge examined various sources including federal case law, state case law, ABA Model Rules of Professional Conduct, and ABA Criminal Standards.[7] These sources provide the same established principle that while the prosecution may inform witnesses of their rights, it may not interfere with a witness's free choice to speak with the defense. Thus, having reviewed the Transferee Judge's order and the authorities cited therein, we conclude the

[7] Various courts, including the United States Supreme Court, rely on or seek guidance from the ABA Model Rules of Professional Conduct and ABA Criminal Standards. *See, e.g., Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (recognizing ABA Criminal Standards as a source of prevailing professional norms); *United States v. Young*, 470 U.S. 1, 8–10 (1985) (seeking guidance from ABA Criminal Standards and ABA Model Rules of Professional Conduct in assessing whether the prosecution's conduct affected the fairness of the trial); *State v. Simmons*, 203 N.W.2d 887, 892–93 (Wis. 1973) (relying on ABA Criminal Standards in assessing undue prosecutorial misconduct). The ABA Criminal Standards are prevailing professional norms of practice which are instructive and helpful. "[T]he Justices of the Supreme Court and hundreds of other judges . . . consult the [ABA Criminal] Standards and make use of them whenever they are relevant." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 AM. CRIM. L. REV. 251, 253 (1974). And the ABA Model Rules of Professional Conduct are applicable in the Commonwealth. *Tenorio v. Superior Court*, 1 NMI 112, 126 n.8 (1990). Accordingly, we find reliance on the ABA Criminal Standards and ABA Model Rules of Professional Conduct appropriate.

Transferee Judge did not deviate from the federal standard or create a bright-line rule. Rather, it examined instructive case law and sought guidance from prevailing professional norms of practice in reaching its decision.

¶ 42 The Commonwealth additionally argues the Transferee Judge erred when it found that Taitano's due process rights had been violated during a pre-trial stage. It asserts a defendant's due process rights cannot be violated unless the defendant is tried and convicted.

¶ 43 The Commonwealth misreads the order. The Transferee Judge did not find any constitutional violation. Rather, it concluded the prosecutorial misconduct would violate Taitano's due process right if the misconduct was not remedied. *Commonwealth v. Allan A. Taitano*, Crim. No. 13-0111 (NMI Super. Ct. Oct. 22, 2014) (Order Granting Def.'s Second Mot. to Exclude Test. of Nukey Manglona Based on Due Process Right to Access Witnesses Without Government Interference (Prosecutorial Misconduct) at 20–21) ("Order Granting Exclusion").[8] The Commonwealth's argument, therefore, is misplaced. Nevertheless, because constitutional claims are subject to de novo review, we examine whether the alleged prosecutorial misconduct violated Taitano's right to due process. In doing so, we must first assess whether there was prosecutorial misconduct.

2. Prosecutorial Misconduct

¶ 44 The Commonwealth argues the Transferee Judge erred in finding prosecutorial misconduct. It argues Badawy and Hartig both acted unprofessionally by engaging in an argument, but that their conduct was a mistake, not misconduct. Whether the prosecution's conduct was improper "is a . . . determination to be made by the [lower] court that we review for clear error." *Vavages*, 151 F.3d at 1188. "The clearly erroneous standard accords high deference to the lower court." *Xiao Ru Liu v. Commonwealth*, 2006 MP 5 ¶ 17. "A finding of fact is clearly erroneous if after reviewing all the evidence . . . [we are] left with a definite and firm conviction that a mistake was made. This deference extends to credibility judgments made by the [] court regarding the credibility of witnesses." *In re Estate of Malite*, 2016 MP 20 ¶ 7 (first alteration in original) (citations omitted). "The test is whether the [court] could rationally have found as it did, rather than whether the reviewing court would have ruled

[8] The Transferee Judge's opinion shows they found prosecutorial misconduct but not a constitutional violation. The Transferee Judge stated "[the court was] not reconsidering a final judgment, but instead elaborating upon [the Initial Judge's earlier] decision and ensuring that the upcoming trial in this case complies with constitutional requirements." Order Granting Exclusion at 7. It noted the Initial Judge had previously fashioned a remedy to protect Taitano's due process rights by ordering Manglona to be available for an interview with defense counsel. However, the events surrounding the prospective interview did not adequately cure the potential prejudice, but instead, further discouraged Manglona from speaking with the defense. *Id*. at 14–15. Thus, the court concluded it "must consider what remedy will prevent a violation of [Taitano's] due process right to equal access to witnesses." *Id.*

differently." *Markoff v. Lizama*, 2016 MP 7 ¶ 8 (citation omitted).

¶ 45 "Prosecutorial misconduct is action or inaction by a prosecutor in violation of some legal norm or standard, e.g., a constitutional provision, a statute, a Manual rule, or an applicable professional ethics canon." *United States v. Edmond*, 63 M.J. 343, 347 (C.A.A.F. 2006) (citation omitted). It is well settled that the prosecution may not hinder a witness's free choice to speak with the defense. *Black*, 767 F.2d at 1338. After reviewing the record, we are not left with a definite and firm conviction that the Transferee Judge made a mistake in finding prosecutorial misconduct.

¶ 46 First, it is undisputed that the prosecution advised Manglona on multiple occasions that speaking with the defense was not good for his case. Second, the Transferee Judge found that the prosecution's words and conduct during the LB Incident were not neutral, but rather had the effect of discouraging Manglona from speaking with the defense. It found the prosecution showed disrespect and hostility towards the defense counsel, which communicated a message to Manglona that he should be "wary of the defense attorneys, that it was not recommended for him to be alone with them, and that it would be bad for the case and [Manglona] if he chose to speak with them." Order Granting Exclusion at 19.

¶ 47 The Transferee Judge made their findings after having the opportunity to listen to the witnesses, test their credibility, gauge their demeanor, and examine what impact, if any, the prosecution's advice and the LB Incident had on Manglona. Because the prosecution's advice to Taitano that it was not in his best interest to speak with the defense was not neutral language and because Manglona completely shut down his communication after the LB Incident, we conclude that, under the deferential standard, the Transferee Judge could rationally have found as they did.

3. Due Process Violation

¶ 48 To prove a violation of the right to due process, defendant must show that the prosecutorial misconduct substantially interfered with his right by a preponderance of the evidence. *Vavages*, 151 F.3d at 1188. The misconduct must be of "*sufficient* significance to result in the denial of the defendant's right to a fair trial." *Jing Xin Xiao*, 2013 MP 12 ¶ 18 (citation omitted). It must be a prejudicial error "to make the resulting conviction a denial of due process." *Id.* (citations omitted). "The burden of showing actual prejudice is heavy . . . ." *Palacios*, 2003 MP 6 ¶ 13 n.15.

¶ 49 "[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982). "While it is clear that both sides have the right to interview witnesses prior to trial, and that curtailment of this right, given our adversarial system, should be permitted only when the clearest and the most

compelling consideration[] so require . . . ." *Salemme v. Ristaino*, 587 F.2d 81, 87 (1st. Cir. 1978) (alteration in original) (citation omitted).

¶ 50 Here, the Transferee Judge did not find prejudice. Nor did Taitano meet the heavy burden of demonstrating prejudice. Other than generally asserting that his right to prepare for trial had been severely limited, Taitano did not show in what fashion the prosecutorial misconduct deprived him of a fair trial. As such, we conclude the prosecution's misconduct did not rise to the level of a constitutional violation.

4. Exclusion of Witness

¶ 51 Lastly, we assess whether excluding Manglona from testifying at trial was an improper remedy fashioned by the Transferee Judge absent a finding of tangible prejudice.

¶ 52 The court has authority to fashion a remedy for prosecutorial misconduct. *See Palacios*, 2003 MP 6 ¶ 20 (imposing sanction based on prosecutorial misconduct). This authority includes excluding evidence, including witnesses' statements and trial testimony. *See United States v. Gonzales*, 164 F.3d 1285, 1291–92 (10th Cir. 1999) (concluding the district court abused its discretion in suppressing the witness's statements and trial testimony as a sanction for government misconduct in the absence of constitutional violation or statutory authority). "The exclusion of witnesses [however] is a severe sanction that raises questions about the fairness of the judicial process." *State v. Harper*, 266 P.3d 25, 32 (N.M. 2011). We find a case from the Supreme Court of New Mexico instructive.

¶ 53 The defendant in *Harper*, 266 P.3d 25, was indicted on a charge of sexually assaulting a child. The district court imposed a deadline to complete interviews of the alleged victim and the doctor who examined her. The prosecution failed to comply with the court-imposed deadline, and the district court prohibited the prosecution from calling the victim and the doctor as witnesses. The court of appeals reversed the district court's ruling, concluding the defendant was not prejudiced by the prosecution, the prosecution did not intentionally violate the court order, and the district court failed to consider less severe sanctions. The Supreme Court of New Mexico affirmed the court of appeals's ruling. *Id*. at 28–30.

¶ 54 The Supreme Court of New Mexico held the witness was improperly excluded. It noted that the exclusion of witnesses, which is tantamount to a dismissal of a case, is a "severe sanction that raises questions about the fairness of the judicial process." *Id.* at 32. Thus, the exclusion of witnesses should be imposed only in "extreme cases, and only after an adequate hearing to determine the reasons for the violation and the prejudicial effect on the opposing party." *Id.* The *Harper* court noted "even when a party has acted with a high degree of culpability, the severe sanctions of dismissal or the exclusion of key witnesses are only proper where the opposing party suffered tangible prejudice." *Id.* at 31. There, because the prosecution did not intentionally refuse to comply with the

court's order and because the defendant did not suffer tangible prejudice, the court found the district court abused its discretion in excluding the witnesses without first imposing a less severe sanction. *Id.* at 33–34.

¶ 55 While facts in *Harper* and the case at bar are distinguishable, we echo the sentiment of the *Harper* decision that extreme sanctions, such as the exclusion of a key witness, are not appropriate remedies absent a showing of actual or tangible prejudice to the defendant. Various authorities asked to address similar issues have also noted the necessity of finding prejudice before granting relief to defendant. *See e.g.*, *Salemme*, 587 F.2d at 87–88 (dismissing petitioner's claim of denied access to a witness because the defendant did not specify in "what fashion he was prejudiced"); *United States v. Walton*, 602 F.2d 1176, 1180 (4th Cir. 1979) (finding defendant was deprived of access to a witness but affirming conviction because no prejudice resulted); *United States v. Cook*, 608 F.2d 1175, 1182 (9th Cir. 1979) (finding no reversible error when defendant was not unfairly handicapped by lack of pretrial access to witnesses); *see also United States v. Lovasco*, 431 U.S. 783, 789 (1977) ("[P]roof of actual prejudice makes a due process claim concrete and ripe for adjudication, [but]… it [does not make] the claim automatically valid."); *cf. Palacios*, 2003 MP 6 ¶ 8 (dismissing indictment with prejudice even when the defendant claimed no prejudice because the dismissal was based on the court's inherent authority to maintain respect for the courts of the Commonwealth, not based on defendant's right to speedy trial).

¶ 56 Excluding the alleged victim, the prosecution's only eyewitness, is tantamount to a dismissal of a case. *Harper*, 266 P.3d at 32. We stated in *Campbell*, "to warrant dismissal [of a case], the government's misconduct must not only be flagrant, but must also have prejudiced the defendant," and that the court should "first consider[] sanctioning counsel or imposing a remedy short of dismissing the case." 4 NMI at 8 (citation omitted).

¶ 57 The Transferee Judge did not find actual or tangible prejudice when it decided to exclude Manglona from testifying. It only concluded there was a potential for prejudice. Because the exclusion of the testimony was based on an erroneous view of the law, we conclude the Transferee Judge abused its discretion in excluding Manglona from testifying at trial.

V. CONCLUSION

¶ 58 For the reasons stated above, we hereby VACATE the Transferee Judge's order excluding the testimony of Manglona and REMAND the case, instructing the Transferee Judge to fashion an appropriate remedy short of exclusion.

SO ORDERED this 28th day of December, 2017.

/s/
JOHN A. MANGLONA
Associate Justice

/s/
ARTHUR R. BARCINAS
Justice Pro Tempore

/s/
TIMOTHY H. BELLAS
Justice Pro Tempore